IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. JULIO A. VELASQUEZ-GASTELUM, Petitioner.	2 CA-CR 2006-0446-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF SANTA CRUZ COUNTY

Cause Nos. CR-95-033 and CV-06-235

Honorable James A. Soto, Judge

REVIEW GRANTED; RELIEF DENIED

Julio A. Velasquez-Gastelum — Phoenix
In Propria Persona

V Á S Q U E Z, Judge.

¶1 After a jury trial, petitioner Julio Velasquez-Gastelum was convicted of two counts of aggravated assault and sentenced to concurrent, mitigated prison terms of six years. This court affirmed the convictions and sentences on appeal. *State v. Velasquez-Gastelum*, No. 2 CA-CR 95-0593 (memorandum decision filed July 23, 1996). In 2002, Velasquez-Gastelum sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S., which the trial court denied. In this appeal, which we have treated as a petition for review, *see* Rule 32.9, Velasquez-Gastelum challenges the trial court's denial of relief on his petition for a writ of error coram nobis filed in 2006.

¶2 In the petition filed below, Velasquez-Gastelum explained that, after having been convicted twice in federal court for unlawfully entering this country, he is serving a federal prison term that was enhanced with the two prior felony convictions in CR-95-033, the subjects of the appeal in this court and the post-conviction proceeding in the trial court. Velasquez-Gastelum alleged the prior convictions that are the subject of this petition were unconstitutionally obtained and are "subject to coll[a]teral attack." He argued one of the victims, Armando Orozco, had given perjured testimony, had been using cocaine at the time of trial, and would now state that Velasquez-Gastelum had not been involved in the assaults. Velasquez-Gastelum asserted the prosecutor had told Orozco not to reveal that he had been using cocaine and coached him into testifying in a certain manner. Velasquez-Gastelum attached Orozco's affidavit to the petition. Velasquez-Gastelum characterized his claims as claims of newly discovered evidence and actual innocence. Consequently, the petition was tantamount to a petition for post-conviction relief based on Rule 32.1(e) and (h). *See* Ariz. R. Crim. P. 32.1, Historical Notes and Comment (noting that former avenues for post-conviction relief, including writ of coram nobis, have been incorporated into proceedings under Rule 32).

¶3 Denying relief and Velasquez-Gastelum's request for appointed counsel, the trial court stated that "the issues raised by the defendant have been previously addressed and adjudicated by the courts either in the direct appeal previously filed by the defendant or in subsequent Rule 32 petitions previously filed by the defendant." We will not disturb that ruling absent an abuse of the court's discretion. *See State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006) (appellate court reviews "for abuse of discretion the superior court's

denial of post-conviction relief based on lack of a colorable claim"). Velasquez-Gastelum has not shown that an abuse occurred.

¶4 The trial court essentially denied Velasquez-Gastelum relief on the ground that his claims are precluded. *See* Ariz. R. Crim. P. 32.2. The court did not err. Velasquez-Gastelum has had a direct appeal and, as far as we can tell, at least one prior post-conviction proceeding. On appeal, he contended, inter alia, that the trial court had abused its discretion by denying his motion for new trial based on the state's failure to disclose material required by *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), that is, information one of the witnesses had agreed to testify against him in exchange for immunity from prosecution. But the witness denied that contention, and police officers confirmed this at a hearing on the motion for new trial. Velasquez-Gastelum also contended the prosecutor was guilty of subornation of perjury. We rejected these claims.

¶5 In the 2002 post-conviction petition, Velasquez-Gastelum raised a claim of newly discovered evidence, attaching Orozco's affidavit in which the victim stated Velasquez-Gastelum had not been involved in the assault but that it had been the fault of Velasquez-Gastelum's codefendant. Orozco stated, "I . . . regret that I have not already withraw[n] my statement made in error in court and I wish to correct that record to show that" Velasquez-Gastelum is innocent.

¶6 Velasquez-Gastelum has failed to establish why he is not precluded from raising this claim at this juncture. To the extent the claims differ substantively from the claims raised on appeal, he has not explained why he did not assert them in his motion for new trial, which he could have then challenged on appeal. And, again, to the extent the

claims are different, Velasquez-Gastelum has not established why he did not raise them in the post-conviction proceeding, particularly since he raised a claim based on this very same witness and the contention that the witness had not testified truthfully at trial.

¶7 Nor has Velasquez-Gastelum established this is a claim of newly discovered evidence under Rule 32.1(e), which is exempt from the preclusive effect of Rule 32.2(a). *See* Ariz. R. Crim. P. 32.2(b) (claims of newly discovered evidence and actual innocence are among exceptions to rule of preclusion). To be entitled to relief on the ground of newly discovered evidence,

> a defendant must establish that the evidence was discovered after trial although it existed before trial; that it could not have been discovered and produced at trial through reasonable diligence; that it is neither cumulative nor impeaching; that it is material; and that it probably would have changed the verdict.

State v. Saenz, 197 Ariz. 487, ¶ 7, 4 P.3d 1030, 1032 (App. 2000). Velasquez-Gastelum asserts on review that "[i]n 2006, [he] discovered the existence of undisclosed or new facts which would support and establish a claim of prosecutorial misconduct." He also states that his failure to disclose the perjury and prosecutorial misconduct was not the result of lack of due diligence but was "due to the State's with[h]olding of its knowledge that its witnesses had perjured the account of the incident and that Mr. Orozco was in fact actually using and abusing cocaine when he testified for the state." But Velasquez-Gastelum does not state why he failed to discover this the first time he submitted this victim's affidavit in the 2002 proceeding. Nor does he specify what information the state withheld from him. Moreover, the additional information as it relates to the victim's credibility is merely impeaching and

is therefore an insufficient basis for relief. *See* Ariz. R. Crim. P. 32.1(e)(3). And neither the claim about the victim's purportedly perjured testimony nor the related claim of prosecutorial misconduct is a claim of actual innocence as contemplated by Rule 32.1(h).

¶8 Velasquez-Gastelum's characterization of this as a "collateral proceeding," suggesting it is subject to different standards of review, does not change its true nature. If he were entitled to relief at all, it would have to be pursuant to Rule 32 because, as we previously stated, a petition for writ of coram nobis is now incorporated into Rule 32. *See* Ariz. R. Crim. P. 32.1, Historical Notes and Comment. And, for the reasons stated above, the trial court did not abuse its discretion in denying relief.

¶9 Finally, because this was Velasquez-Gastelum's second post-conviction proceeding, it was for the trial court to determine, in the exercise of its discretion, whether to appoint counsel to represent him. *See* Ariz. R. Crim. P. 32.4(c). He has not persuaded us the court abused that discretion.

¶10 The petition for review is granted, but relief is denied.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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JOSEPH W. HOWARD, Presiding Judge